of the respondents is founded upon the doctrine that the purchaser of an equity of redemption is bound under an obligation of conscience to indemnify
[78] [78] the vendor against the liability on the mortgage debt. The obligation, as Fletcher Moulton L.J. said in *Mills* v. *United Counties Bank,* [1912] 1 Ch. 231, is based on good sense and it relates to every case where you can reasonably imply that it was the intention of the parties that such an indemnity should be given.

It may be observed that if the property possesses a speculative value so that it is by no means certain that upon realisation there will be a sum sufficient to satisfy the mortgage-debt and interest, a purchaser of the equity of redemption might well refuse to give a covenant of indemnity to the mortgagor. Nor does this necessarily result in making a present to the purchaser of the equity, for, the mortgagor, if called upon to pay the amount due under the covenant for payment contained in the mortgage is entitled to take a transfer of the mortgage from the mortgagee and can then if he pleases sell or foreclose. Plainly there are a number of cases in which the purchaser of the equity would refuse to give a covenant of indemnity, especially if he were aware that the vendor of the equity could sell the right of indemnity for cash to the mortgagee. There are cases in which the purchaser might be willing to give such a covenant only on condition that it was personal to the vendor and therefore not assignable. Their Lordships observe that in rebutting the implication of an equity such as this, the appellants are not claiming to modify or affect the deed of transfer in any way. They are doing no more than is involved in the contention that the registered deed of transfer fully expresses the contract between the parties. For the reasons above indicated the true bargain between the parties in the present case has to be ascertained by considering the position which Nickson occupied in relation to Cummings. It seems to their Lordships quite impossible to believe that if Nickson had informed Cummings that either Cummings himself or a trust company as his nominees would be required to assume responsibility for the first mortgage, and for that purpose to enter into a covenant either with Nickson himself or with Prudential Holdings, Limited, the proposal would not have been wholly rejected. Neither Nickson nor the Prudential Holdings, Limited, was in a position to exact in the circumstances any such term from Cummings, nor did they attempt to do so. The evidence of Mitchell, Coulter and also of Bone on this point is uncontradicted, and no reason seems to have been given for the absence of Nickson from the witness-box. The position of the appellants is even stronger. It is most unusual for a bare trustee to enter into any covenant in connection with a conveyancing matter. It is well known that trustees for sale are not in the habit of entering into covenants for title, and purchasers have to be content with the covenant that the trustees have not themselves encumbered.

Without deciding that the circumstance that an apparent purchaser of an equity of redemption is to the knowledge of the apparent vendor a trustee for a third party is alone sufficient to rebut the *prima facie* implication above stated, it is clear that very little is sufficient in such a case to show that no such implication can fairly be made. The letter of the 18th February, 1926, above referred to, written by Mitchell, the agent for both parties to the appellants, is sufficient to show that the appellants were not prepared to undertake the implied liability under discussion, and did not suppose that they were doing so; and for the reasons already given Cummings, who was liable under his express covenant to indemnify the appellants, could not fairly be asked directly or indirectly to undertake such an obligation. It is the modern practice in sales of an equity of redemption to insert an express covenant of indemnity by the purchaser where such a covenant is part of the agreement, and the absence of such a covenant in the circumstances of the persent case affords an additional reason for the conclusion that the deed of transfer contains a complete record of the bargain between the parties. Their Lordships agree with the decisions of the Canadian Courts in similar matters to which they were referred and in particular with the cases of *Walker* v. *Dickson,* (1893) 20 Ont. A.R. 96, and *Campbell* v. *Douglas,* 34 O.L.R. 580 and 54 S.C.R. 28. Both those decisions seemed to their Lordships strongly to support the conclusion at which they have arrived.

The respondents based an argument upon the doctrine of estoppel. They contended that having regard to the form of the deed of transfer and to the fact that it and the resolution above referred to were duly registered in the Land Registry, the appellants were estopped as against the respondents from alleging that the relationship of vendor and purchaser did not arise between the Prudential Holdings, Limited, and the appellants. In their Lordships' view there was no evidence that the respondents either saw or acted upon the documents in the Land Registry, still less was there evidence that the respondents changed their position to their prejudice in consequence of the form of the deed of transfer or of the resolution of even date. In these circumstances no argument founded on estoppel can prevail. In substance it will be noted that their Lordships agree with the careful and elaborate dissenting judgment of Mr. Justice Macdonald except that they do not think it necessary to decide whether the deed of transfer ought to be held to operate as a mortgage. Their Lordships will therefore humbly advise His Majesty that the appeal in the present case [79] should be allowed and that the [79] action should be dismissed with costs here and below.

*Appeal allowed.*

Solicitors: *Linklaters & Paines; Blake & Redden.*

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## TYAGARAJA MUDALIAR & ANOR. v. VEDATHANNI

**[P.C. (Lords Thankerton and Alness and Sir John Wallis) December 6, 1935]**
**[Privy Council Appeal No. 13 of 1934]**

*Evidence — Written contract — Oral evidence — When admissible — Indian Evidence Act, (1872) ss.91, 92.*

*Contract — Agreement embodied in document — Party to agreement told that stipulation in agreement would not be enforced — Document does not amount to real agreement — Other party cannot sue on it.*

Section 92 of the Indian Evidence Act, 1872, operates only to exclude parol evidence to vary the terms of a written contract but does not affect the question whether the parties had agreed to contract on the terms set out in the document. The effect of section 91 of the same Act is to exclude oral evidence as to the terms of a written contract. There is nothing in either section which excludes oral evidence that there was no agreement and therefore no contract. Thus, oral evidence is admissible to show that a document executed by a party was never intended to be acted upon as an agreement but was brought into existence for the purpose of creating evidence of some other matter.

*Pym* v. *Campbell,* 6 E. & B. 370; 119 E.R. 903; *Pertab Chunder Ghose* v. *Mohendra Purkait,* (1889) L.R. 16 I.A. 233; I.L.R. 17 Cal. 292; and *Mottayappan* v. *Palani Goundan,* I.L.R. 38 Mad. 226 considered and relied on.

PRIVY COUNCIL APPEAL from India (Madras).

*L. De Gruyther,* K.C. and *P. V. Subba Rao* for the appellants.

*A. M. Dunne,* K.C. and *C. Sydney Smith* for the respondent.

*Cur. Adv. Vult.*

Their Lordships' judgment was delivered by —

**Sir John Wallis:** The plaintiff, Vedathanni, widow of the late Ramalinga Mudaliyar, who died without issue on 23rd December, 1912, instituted this suit, on 25th July, 1925, in the Court of the Subordinate Judge of Negapatam, against the two widows of T. Somasundara Mudaliyar, her husband's brother who had survived him, impleading also the minor defendant 3 who had been adopted by the junior widow on 1st July, 1925, and defendants 4 and 5 who had been appointed receivers of the family properties in the suit instituted by defendant 1 disputing the adoption. The plaintiff claimed to recover arrears of maintenance from 1st January, 1914, when she began to live separately from her husband's family at the rate of Rs. 10,000 a year. It was stated in the plaint that the ante-adoption deed executed on behalf of the minor defendant 3 by his natural father, on 21st June, 1925, in favour of the adopting widow, had made a provision for the plaintiff's maintenance which would work out at Rs. 10,000 a year, and in the interests of peace she was willing to accept this sum although it was much below what would be legitimately due to her.

It was alleged in the plaint that the two brothers Somasundara and Ramalinga Mudaliyar were members of an undivided Hindu family and owned extensive movable and immovable properties in the Tanjore District of the approximate value of about 50 lakhs, Rupees 5,000,000, but had been living separately and enjoying the said lands in separate portions; and that in consequence, on Ramalinga's death, Somasundara, the surviving brother, feeling nervous as to the possibility of his widow, the plaintiff, setting up the case that the brothers had separated and that the plaintiff was accordingly entitled to a widow's estate in one-half of the family properties, was anxious that a document should be executed evidencing the undivided status of the family. With this object, a document was executed on 28th December, 1912, by the plaintiff and by Somasundara affirming the undivided status of the family and purporting to make provision for the plaintiff's maintenance. It was however distinctly understood that this document was not to be final contract for the plaintiff's maintenance but was solely intended as a voucher establishing the joint undivided nature of the family, it being agreed that the plaintiff's claim for maintenance on a scale commensurate with the position and status of the family was to be left over for future settlement at leisure. Consequently the provision for maintenance in the deed was never given effect to or acted on by the parties, and Somasundara continued in possession and enjoyment of all the family properties until his death on 17th January, 1925. The plaintiff had lived separately from her husband's family from the beginning of 1914 (being maintained as appeared from the evidence by her own family) and had repeatedly asked Somasundara to make due provision for her maintenance. He had repeatedly promised to do so, but died without having made any such provision or paid her anything for her maintenance.

Defendant 1 did not file any written statement, and defendant 2, in a joint written statement filed on behalf of herself and the minor defendant 3, put the plaintiff to the proof of the allegations in the plaint. She stated that she was informed and believed that for several years past the plaintiff had not received any income from the lands set apart for her maintenance, and was therefore entitled to the mesne profits in respect of past maintenance. As regards the future, she admitted the execution of the ante-adoption deed making provision for the plaintiff, and as the matter concerned the estate of the minor defendant 3, she left the Court to fix such [80] maintenance as might be deemed reasonable. The family admittedly owned 1,500 velis of wet and dry land of the approximate value of no less than 50 lakhs of rupees which they had apparently acquired in the course of their money-lending business by buying up the holdings of raiyats with whom the land revenue had been temporarily settled under the raiyatwari system prevailing in Tanjore. They also owned several lakhs of rupees invested in the money-lending business. Some time before the death of the plaintiff's husband, the two brothers had divided their lands and begun to live separately, and according to the evidence the income from the lands in the husband's possession amounted to Rs. 70,000, all of which he spent. [80]

These facts were sufficient to raise a *prima facie* case of separation in which case his widow would be entitled for life to one-half of the family properties. On his death in December 1912 his elder brother, Somasundara, took control, had the body removed to his own house for funeral rites and locked up the other house in which there was a box containing jewels of which the widow had the key. The widow, who went to live with him, disclaimed any intention of setting up a case of separation; but there was always the possibility that her relations might persuade her to change her mind; and at his request she agreed to sign a document evidencing the undivided status of the family. He proceeded at once to have a deed of settlement drawn up by which from that day onwards she was to have the jewels in her possession as set out in Schedule A with full powers of alienation; and as soon as she decided to live apart from him, she was to enjoy for her life the income of the lands and to live in the house mentioned in Schedule B. In consideration of

this provision she relinquished her claims for maintenance. The annual income of the lands set apart for her was between Rs. 2,000 and Rs. 2,500, only Rs. 200 a month; and, as regards the house in Bazaar Street, Tiruvarur, the plaintiff stated in her evidence that people of her status and condition of life could not live there at all. There are concurrent findings of the Courts below that when this document was presented to her three days after her husband's death, she refused to sign it, and was only induced to do so two days later by representations that it would not be acted on, and was only intended to provide evidence of the undivided status of the family. It was held by both Courts on these facts that there was no agreement and therefore no contract. There can be little doubt that if a suit had been brought in time, this agreement might have been set aside on the ground of fraud or undue influence. What happened however was that the plaintiff retained the jewels which had all along been in her possession and that no effect was given to the provision for her maintenance. A year after her husband's death she went to live with her own people and has since been maintained by them. Somasundara died on 17th January, 1925; and his junior widow, defendant 2, executed the ante-adoption deed in which provision was made for the plaintiff's maintenance on the following 6th June and adopted the minor defendant 3 on 7th July; and on 21st December the plaintiff filed the present suit to recover arrears of maintenance at the rate already mentioned from 1st January, 1914, when she ceased to live with her husband's family. As the arrears were claimed for less than 12 years the suit was in time.

The main question arising in this appeal is whether, as contended by the appellants under the provisions of sections 91 and 92, Evidence Act, oral evidence was inadmissible to establish that it had been agreed that the provisions for the plaintiff's maintenance were not to be acted on, as the document was only intended to create evidence of the undivided status of the family. The Madras High Court, from which this appeal comes, has repeatedly held such evidence to be admissible, and decisions to the same effect of the High Courts at Calcutta, Patna and Rangoon have been cited. There is however one decision of the Allahabad High Court, the other way. In support of the admissibility of this evidence, the respondents have also cited the decision of this Board in *Pertab Chunder Ghose* v. *Mohendra Nath Purkait*, 17 Cal. 291; 16 I.A. 233, which came before Lord Watson, Sir Barnes Peacock and Sir Richard Couch. That was a suit by a zemindar to eject tenants under a kabuliyat which they had executed; and their Lordships, in a judgment dismissing the appeal which was delivered by Sir Richard Couch, observed that:

> "If there was any stipulation in the kabuliyat which the plaintiff told the tenants would not be enforced, they cannot be held to have assented to it, and the kabuliyat is not the real agreement between the parties and the plaintiff cannot sue upon it."

There was a finding that when the defendants objected to signing the kabuliyat on account of the stipulation entitling the zemindar to take khas possession at any time, they were told that it would not be acted on; and, as the experienced counsel for the appellants who contended that the learned Judges of the High Court were not justified in holding on that finding that the contracting parties were not of one mind as to the agreement, had not submitted that the oral evidence on which the finding was based was inadmissible to show that there was no agreement between the parties, it was unnecessary to deal with this question in the judgment of the Board. It may however in their Lordships' opinion be safely inferred that Sir Richard Couch and Sir Barnes Peacock were well acquainted with the provisions of the Evidence Act and saw no objection to the reception of oral evidence to show that there was no agreement and therefore no contract. The two relevant sections are as follows, the exceptions and [81] explanations in [81] section 91 being omitted as having no bearing on the question:

> 91. When the terms of a contract, or of a grant or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.
>
> 92. When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms:
>
> *Proviso* (1). — Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law.
>
> *Proviso* (2). — The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document.
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> *Proviso* (3). — The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved.
>
> *Proviso* (4). — The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents.
>
> *Proviso* (5). — Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description, may be proved: Provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract.
>
> *Proviso* (6). — Any fact may be proved which shows in what manner the language of a document is related to existing facts.

There being no *proviso* in either section making oral evidence to show that there was no agreement and therefore no contract inadmissible, their Lordships will

consider, in the first place, whether there is anything in the sections themselves to render it inadmissible, and secondly, whether the terms of *proviso* 1 to section 92 are not wide enough to make it admissible under that *proviso*. When a contract has been reduced to the form of a document, section 91 excludes oral evidence of the terms of the document by requiring those terms to be proved by the document itself unless otherwise expressly provided in the Act, and section 92 excludes oral evidence for the purpose of contradicting, varying, adding to, or subtracting from such terms. Section 92 only excludes oral evidence to vary the terms of the written contract, and has no reference to the question whether the parties had agreed to contract on the terms set forth in the document. The objection must therefore be based on section 91 which only excludes oral evidence as to the terms of a written contract. Clearly under that section a defendant sued, as in the present case, upon a written contract purporting to be signed by him could not be precluded in disproof of such agreement from giving oral evidence that his signature was a forgery. In their Lordships' opinion oral evidence in disproof of the agreement (1) that as in *Pym* v. *Campbell,* 6 E. & B. 370, the signed document was not to operate as an agreement until a specified condition was fulfilled, or (2) that as in the present case, the document was never intended to operate as an agreement but was brought into existence solely for the purpose of creating evidence of some other matter stands exactly on the same footing as evidence that the defendant's signature was forged. In *Pym* v. *Campbell,* the defendants were sued upon a written contract to purchase an invention, and Lord Campbell had ruled at the trial that on the plea denying the agreement oral evidence was admissible that it had been agreed between the parties before they signed that there was to be no agreement until the invention was approved by *A*. In his judgment discharging the rule *nisi* for a new trial, Lord Campbell said:

> It was proved in the most satisfactory manner that before the paper was signed, it was explained to the plaintiff that the defendants did not intend the paper to be an agreement till *A* had been consulted and found to approve of the invention; and that the paper was signed before he was seen only because it was not convenient for the defendants to remain. The plaintiff assented to this, and received the writing on those terms. That being proved, there was no agreement.

Erle J. who gave judgment first had dealt more fully with this question:

> The point made is that there is a written agreement absolute on the face of it, and that evidence was admitted to [82] show that it was conditional; and if that had been so it would have been wrong. But I am of opinion that the evidence showed that in fact there was never any agreement at all. The production of a paper purporting to be an agreement by a party with his signature attached, affords a strong presumption that it is his written agreement; and, if in fact he did sign the paper *animo contrahendi,* the terms contained in it are conclusive and cannot be varied by parol evidence . . . . but, if it be proved that in fact the paper was signed with the express intention that it should not be an agreement, the other party cannot fix it as an agreement upon those so signing. The distinction in point of law is that evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is admissible.

The Indian legislature has thought well to give statutory effect to the decision in *Pym* v. *Campbell* in *proviso* 3 to section 92:

> The existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract . . . . may be proved;

and in *Mottayappan* v. *Palani Goundan,* 38 Mad. 226 Benson and Sundara Ayyar JJ. have expressed the opinion that oral evidence to show that a document was never intended to operate according to its terms, but was brought into existence, as in the present case, solely for the purpose of creating evidence about some other matter, is admissible under *proviso* 1 to section 92, "any fact may be proved which would invalidate any document." This may well be so, but in their Lordships' opinion, even if there were no *provisoes* to either section, the result in the present case would be the same, because there is nothing in either section to exclude oral evidence that there was no agreement between the parties and therefore no contract. It was also contended that the case came within section 92, because of the provision recognising the widow's title to the jewels in her possession. The High Court have found that this provision was not intended to operate as an agreement, but was introduced to give verisimilitude to the document, it being usual to make such a provision in agreements for a widow's maintenance. Further, it was held by this Board in the passage already cited from the judgment in *Pertab Chunder Ghose* v. *Mohendra Purkait,* that if the defendants were told that any stipulation in the agreement would not be enforced, they could not be held to have assented to it. Consequently the document was not the real agreement between the parties, and the plaintiff could not sue upon it. In their Lordships' opinion both the lower Courts were right in finding on the oral evidence in this case that there was no contract, and they will humbly advise His Majesty that the appeal be dismissed with costs.

*Appeal dismissed.*

Solicitors: *Harold Shephard; H. S. L. Polack & Co.*

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[83] STRAITS SETTLEMENTS REPORTS [83]

**PUBLISHED BY AUTHORITY**

## *Re* R. E. SMITH, DECEASED
## MUTHUCARPEN CHETTY v. BEATRICE KATE SMITH

**[O.C.J. (Shaw C.J.) May 23, 1923]**
**[Singapore Originating Summons No. 42 of 1923]**
**[C.A. (Sproule, Barrett-Lennard and Brown JJ.)]**
**[Singapore Civil Appeal No. 20 of 1923]**

*Ordinance No. 135 (Municipal), s.19(2).*

Money received by the administratrix of a deceased Municipal officer out of the Municipal provident fund is subject to payment of the debts of the deceased.

ADJOURNED ORIGINATING MOTION.

The facts and arguments sufficiently appear from the judgment.

*Da Silva* for the plaintiff.

*Zehnder* for the defendant.

*Cur. Adv. Vult.*